HEIRS OF DOROTHY GORDON

IBLA 75-307 Decided October 15, 1975

Appeal from decision of the Fairbanks District Office, Bureau of Land Management, rejecting in part Native allotment application F 18781.

Affirmed.

1. Administrative Procedure: Administrative Procedure Act -- Alaska: Native Allotments -- Regulations: Generally -- Secretary of the Interior

   The Secretarial instruction of October 18, 1973, which mandates a showing by a Native allotment applicant of 5 years of occupancy prior to a withdrawal of the land, was not required to be published as rule making since 5 U.S.C. § 553(a)(2) (1970) exempts from its ambit matters pertaining to public property.

2. Alaska: Native Allotments

   Where a Native allotment application is not allowable because of failure to meet requirements of law and the applicant dies, her heirs gain no rights to the land.

APPEARANCES: William Rives, Esq., of Davis, Wright, Todd, Riese & Jones, Seattle, Washington, for appellants.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

The heirs of Dorothy Gordon have appealed from the decision dated December 2, 1974, rendered by the Fairbanks District Office of the Bureau of Land Management, rejecting "Parcel A" of Native allotment application F-18781. The rejection was based upon two grounds: (1) the land has been withdrawn from such appropriation since February 3, 1943, and the applicant had not shown that she

had occupied the land for 5 years prior thereto; and (2) since the applicant, Dorothy Gordon, died in 1972, without having met the 5-year requirement, there are no rights which could inure to her estate.

[1] Appellants assert that the 5-year requirement of occupancy prior to a withdrawal, embodied in a Secretarial instruction of October 18, 1973, is contrary to law. That conclusion is premised upon the assumption that the instruction is in effect rule making and the procedures embodied in 5 U.S.C. § 553 (1970), should have been followed.

However, that argument ignores 5 U.S.C. § 553(a)(2) (1970) which exempts from its rule making provisions "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." (Emphasis supplied.) Public lands are public property and therefore are exempt from the rule making procedure. McNeil v. Seaton, 281 F.2d 981, 986 (D.C. Cir. 1960).

Moreover, 5 U.S.C. § 701(a)(2) (1970), excludes from judicial review "agency action committed to agency discretion by law." This provision has been applied to preclude review of classification of land made by the Secretary of the Interior, Pallin v. United States, 496 F.2d 27 (9th Cir. 1974); Lewis v. Hickel, 427 F.2d 673 (9th Cir. 1970) (refusal to make section 8 exchange); Ferry v. Udall, 336 F.2d 706 (9th Cir. 1964), cert. denied, 381 U.S. 904 (1965) (refusal to accept high bid at public sale). See Memorandum and Order in Pence v. Morton, Civ. No. A 74-138 (D. Alas., April 8, 1975), appeal pending, Civ. No. 75-2144 (9th Cir.).

The Alaska Native Allotment Act of May 17, 1906, 34 Stat. 197, amended by 70 Stat. 194, as amended, 43 U.S.C. § 270-1 to 270-3 (1970), provided in material part, as follows:

> The Secretary of the Interior is authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of vacant, unappropriated, and unreserved nonmineral land in Alaska * * * to any Indian, Aleut, or Eskimo of full or mixed blood who resides in and is a native of Alaska, and who is the head of a family, or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity * * *. (Emphasis supplied.)

It is clear that the allowance of Native allotment applications is "agency action committed to agency discretion by law."

The requirements for 5 years of use and occupancy prior to a withdrawal has been approved by this Board in numerous decisions.

Annie Soplu, 22 IBLA 38 (1975); Herman S. Rexford, 22 IBLA 20 (1975); Emma Moses, 21 IBLA 264 (1975); Heirs of Charles E. Frank, 21 IBLA 248 (1975); Warner Bergman, 21 IBLA 173 (1975). Cf. Katie Wasillie, 20 IBLA 330 (1975); Donald F. Nielson, 21 IBLA 258 (1975); Victor A. Anahonak, 21 IBLA 347 (1975); Susie Ondola, 17 IBLA 359 (1974); Christian G. Anderson, 16 IBLA 56 (1974).

We reaffirm the proposition that an applicant must show 5 years of occupancy prior to the withdrawal of the land in order to have a viable application.

[2] Dorothy Gordon executed her Native allotment application on November 21, 1970. She died in 1972. We held in Thomas S. Thorson, 17 IBLA 326 (1974), that no rights inure to the estate of a deceased Native allotment applicant where the application filed by the deceased during her lifetime, does not show prima facie entitlement. Where, as in the case at bar, occupancy for 5 years prior to the withdrawal is not demonstrated, and the application concedes that such occupancy commenced some 3 years prior to the withdrawal, the application cannot be allowed. It necessarily follows that no rights to Parcel "A" inured to appellants.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Anne Poindexter Lewis
Administrative Judge